82-345

Office-Supreme Court, U.S.
FILED
AUG 24 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-

In the Supreme Court of the United States

October Term, 1982

EDWARD COOPER, CITY ATTORNEY OF SANTA ANA, CALIFORNIA,

Petitioner,

vs.

MITCHELL BROTHERS' SANTA ANA THEATER, located at 1565 West 17th Street, Santa Ana, County of Orange, California; M.B.F.G. THEATER CIRCUIT, INC.; JIM GISH; ALLISON HONER CO., a partnership; UNITED ARTISTS THEATER CIRCUIT, INC.; CONTINENTAL AUXILIARY COMPANY, a California Corporation; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association; JAMES MITCHELL; ARTIE MITCHELL; DEMICH, INC., a California Corporation; MITCHELL BROTHERS FILM GROUP, a General Partnership; CINEMA 7, INC., a California Corporation; Does 1 through 100, inclusive,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

Edward Cooper
Santa Ana City Attorney
20 Civic Center Plaza
Santa Ana, CA 92701

James J. Clancy
9055 La Tuna Canyon Rd.
Sun Valley, CA 91352

Attorney for Petitioner

QUESTIONS PRESENTED

1. Whether an order of a trial court which closes a theater as a public nuisance pursuant to its Equity Powers, after a trial on the merits and as a penalty for a past, continuous, course of unlawful conduct, is a prior restraint which is prohibited by the United States Constitution?

2. Whether the Court of Appeal's decision which precludes all civil public nuisance abatement and equitable sanctions against the exhibition of obscene motion picture films except the remedy of a personal injunction against a specific film, has deprived the plaintiff, as the authorized law officer representing Santa Ana residents, of federal rights under the 9th, 10th and 14th Amendments to the U.S. Constitution; and whether this Court's decision

in Vance v. Universal Amusement Co., Inc., 455 U.S. 308, was intended to so limit the available state remedies?

2(a) Whether the trial court's order, which established a $100,000.00 trust fund as security for attorney's fees, costs and expenses incurred by the City in establishing public nuisances at the Mitchell Brothers' Santa Ana Theater in future obscenity public nuisance abatement lawsuits, constituted a prior restraint; and, if not, whether the Court of Appeal's holding that such remedy was not available to the City of Santa Ana and its residents under California law was a denial of equal protection of the law, in view of the fact that:

(1) the California Judiciary in Serrano v. Priest, 20 Cal.3d 25 at 46, pursuant to an exercise of

its equity powers, has authorized the payment of attorney's fees in other similar cases where "rights created or protected by the State Constitution are protected to the benefit of a large number of people" and where the "nature of the litigation was such that subsidization of the plaintiff is justified in the event of their victory"; under the private attorney-general principle; and

(2) the California Legislature in C.C.P. section 1021.5 has enlarged the Serrano ruling to include cases beyond those vindicating constitutionally based rights, and has authorized the payment of attorney's fees to others in cases involving environmental protection, Woodland Hills Residents Assn., Inc. v. City

Council of Los Angeles, 23 Cal.3d 917 at 925, 936, but has excluded such payment to "public entities" such as the City of Santa Ana which, has had occasion to appear as a plaintiff and file public nuisance abatement lawsuits to protect the moral environment of the City?

2(b) Whether it is a denial of due process of law and equal protection of the law to deny the residents of the City of Santa Ana reimbursement for damages (damages to the moral environment and costs of abatement) when it is the prevailing party in a public nuisance abatement lawsuit, in view of the fact that, under this Court's decision in Owens v. City of Independence, Mo., 445 U.S. 622, the City of Santa Ana no longer is immune

from financial liability in such cases and the City (and its residents as taxpayers) would be absolutely liable for damages and attorney's fees under 42 U.S.C. §1983 and 42 U.S.C. section 1988, and would be subject to liability for attorney's fees under California Code of Civil Procedure section 1021.5, had it not prevailed against the Santa Ana Mitchell Brothers' Theater?

2(c) Whether, in view of Serrano v. Priest, supra, and California Code of Civil Procedure section 1021.5, the trial court's refusal to exercise its equity powers and award attorney's fees to the City Attorney, acting for and on behalf of the residents of Santa Ana in the underlying public nuisance abatement lawsuit, was an abuse of discretion and a denial of due process of law and equal protection of the laws?

SUBJECT INDEX

	Page
QUESTIONS PRESENTED	1
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	2
JURISDICTION	3
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	5
SUMMARY OF ARGUMENT	28
REASONS FOR GRANTING THE WRIT	32
INTRODUCTION	32
A. The Differing Circumstances In This Second Petition For Writ Of Certiorari Regarding The Federal "Closure" Issue.	37
B. The Refinement In This Second Petition For Writ Of Certiorari Presented By Subsidiary Questions 2A, 2B and 2C On The Broad Question As To Whether By Limiting Santa Ana's Remedy To A Personal Injunction Against A Specific Film, The Court Of Appeal's Judgment Has Deprived The Petitioner Of Federal Rights. ..	43

I

TRIAL JUDGE WEEKS' CONCLUSION OF LAW XVI THAT, AS AN EQUITY JUDGE HE WOULD HAVE CLOSED THE MITCHELL BROTHERS' SANTA ANA THEATER AS A PUBLIC NUISANCE EXCEPT FOR THE FACT THAT THE FEDERAL CONSTITUTION PREVENTED "CLOSURE", WAS BASED UPON AN ERRONEOUS PREMISE. A TRIAL COURT HAS THE EQUITABLE POWER, AFTER A TRIAL ON THE MERITS, TO CLOSE A THEATER WHICH PRESENTLY CONSTITUTES A PUBLIC NUISANCE, AS A PENALTY FOR A PAST CONTINUOUS COURSE OF UNLAWFUL CONDUCT. SUCH AN ORDER DOES NOT CONSTITUTE AN UNLAWFUL PRIOR RESTRAINT UNDER THE FEDERAL CONSTITUTION. 45

II

THE COURT OF APPEAL'S JUDGMENT WHICH PRECLUDES ALL CIVIL PUBLIC NUISANCE ABATEMENT AND EQUITABLE SANCTIONS EXCEPT A PERSONAL INJUNCTION AGAINST A SPECIFIC FILM HAS DEPRIVED THE PLAINTIFF OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW AND A CONSTITUTIONALLY ADEQUATE JUDICIAL REMEDY. THE REMEDY IS INADEQUATE AND A DENIAL OF DUE PROCESS OF LAW BECAUSE A PERSONAL INJUNCTION AGAINST EACH FILM CAN ONLY BE OBTAINED AFTER THE EXHIBITION OF EACH OBSCENE FILM AND LENGTHY LITIGATION; AND AT GREAT COSTS OF ABATEMENT TO THE CITY; AND AT GREAT FINANCIAL RISK TO THE CITY AND ITS OFFICERS AND EMPLOYEES; AND WITHOUT REIMBURSEMENT OF ABATEMENT COSTS FROM THE PERSON MAINTAINING AND PROFITING FROM SAID PUBLIC NUISANCE; AND WITHOUT THE REMEDY OF AN ATTORNEYS' FEE WHICH REGULARLY

IS AWARDED TO OTHER PARTIES IN SUCH ENVIRONMENTAL PROTECTION CASES; AND RESULTS IN A TAKING OF PROPERTY WITHOUT JUST COMPENSATION. 51

A. The Court Of Appeal's Reversal Of That Part Of The Trial Court's Judgment Which Ordered "The Payment By The Defendants Of $100,000 Into A Trust Fund For The City's Future Attorney's Fees" Was Arbitrary And Denied The City Attorney, Acting For And On Behalf Of The Residents Of Santa Ana, Equal Protection Of The Law By Denying The Benefits Under California Law Which Accrue To A Prevailing Party Who Acts As A Private Attorney-General In An "Environmental Protection" Lawsuit.. 56

B. The Refusal To Permit The City Attorney, Acting For And On Behalf Of The Residents Of Santa Ana, The Right To Recover Damages Resulting From The Public Nuisance Constitutes A Taking Of Property Without Due Process Of Law. 60

C. The Trial Court's Discretion To Award An Attorney's Fee In An "Environmental Protection" Lawsuit Brought By The City Attorney On Behalf Of The Residents Of Santa Ana, Is Controlled By C.C.P. §1021.5. Upon Remand Petitioner Is Entitled To The Allowance Of An Attorney's Fee Which Is Not Subject To The "Public Entities" Exclusion Of C.C.P. Section 1021.5. 63

CONCLUSION 64

INDEX TO APPENDICES

APPENDIX

A Opinions of Court of Appeal.

B Opinion of Trial Court.

C Findings of Fact and Conclusions of Law, and Judgment After Trial by Court.

D Time and Motion Studies.

E Orders of California Supreme Court and Courts of Appeal.

F California Statutory Provisions.

G Newspaper Articles.

H List of Hard-core Pornographic Films.

CASES

Art Theater Guild, Inc. et al. v. Ewing, 421 U.S. 923 ..... 28, 34

Builder's Supply Depot v. O'Connor, 150 Cal. 265 60

Clancy, et al. v. Jartech, Inc., et al., Nos. 81-2094, 81-2095, 81-2096 ..... 7, 39

Edward Cooper, City Attorney of Santa Ana v. Mitchell Brothers' Santa Ana Theater, et al., No. 81-271 ..... 2, 5, 25, 37

Franzblau v. Monardo, 108 Cal. App.3d 522 58

Freedman v. Maryland, 380 U.S. 51 33

Gulf C. and S.F.R. Co. v. Ellis, 165 U.S. 150 .. 60

Harmer, et al. v. Deep Throat, 432 U.S. 907 62

Harmer, et al. v. Devil in Miss Jones,
430 U.S. 967 62

Huffman v. Pursue, Ltd., 420 U.S. 592 ..... 28, 34

Idaho ex rel. Kidwell v. U.S. Marketing, Inc.,
___ Idaho ___, 631 P.2d 622 ..... 36, 50

Johnson v. V.D. Reduction Co., 175 Cal. 63 61

Mandel v. Myers, 29 Cal.3d 531 52

Marini v. Municipal Court for Santa Cruz, etc.,
99 Cal. App.3d 829 57

Miller v. California, 413 U.S. 15 40

Mugler v. Kansas, 23 U.S. 623 52

Nebbia v. New York, 291 U.S. 502 63

Owen v. City of Independence,
445 U.S. 622 ..... iv, 59, 62

People et al. v. City of Los Angeles,
160 Cal. App.2d 494 61

People v. James Mitchell, et al.,
64 Cal. App.3d 335 6

People, ex rel. Busch v. Projection Room Theater
et al., 17 Cal.3d 42 ...
..... 12, 26, 33, 36, 38, 46, 48, 58, 61

People, ex rel. Camil, City Attorney of Duarte
v. Buena Vista Cinema,
57 Cal. App.3d 497 ..... 10, 11

Phalen v. Commonwealth of Virginia,
12 L.Ed. 1030 52

Rex v. Curl, 2 Strange 789 52

San Francisco v. Buckman, 111 C. 25 61

Serrano v. Priest, 20 Cal.3d 25 ....
..... ii, v, 30, 45, 56, 59, 64

Sir Charles Sedley's Case, I SID 168 52

Skinner v. Oklahoma, 316 U.S. 535 63

Southeastern Promotions, Ltd., v. Conrad,
420 U.S. 546 33

U.S. Marketing, Inc., et al. v. Idaho, et al.,
___ Idaho ___, 631 P.2d 622 37

Vance v. Universal Amusement Co., Inc.
455 U.S. 308 ..... ii, 23, 24, 27, 28, 35, 44

Van de Kamp, as District Attorney v. Projection
Room Theater, et al., 428 U.S. 922 13

Woodland Hills Residents Assn., Inc. v. City
Council of Los Angeles, 23 Cal.3d 917 ...
..... iii, 57, 58, 63

Zobel v. Williams, ___U.S.___, (June 14, 1982)... 45

STATUTES, ETC.

California Civil Code
§5 3
§22.5 3
§3366-3369 3
§3479 12
§3480 12
§3484 60
§3493 60
§3479-3484 3
§3490-3459 3
§3523 ..... 3, 52

California Code of Civil Procedure
§731 ..... 4, 13, 60
§1021 4
§1021.5 .. iii, v, 4, 30, 57, 58, 59, 63, 64, 65

California Government Code
§38771 4
§38773 4
§38773.5 4

Rules of the United States Supreme Court
Rule 15.1(h) 39
Rule 16.1(c) 39
Rule 17(b) 3, 28, 37, 65
Rule 17(c) 3

United States Codes
28 U.S.C. §1257(3) 3
42 U.S.C. §1983 ..... v, 59, 63
42 U.S.C. §1988 ..... v, 59, 63

United States Constitution
First Amendment i
Ninth Amendment i
Tenth Amendment i
Fourteenth Amendment i

ORDINANCES AND RESOLUTIONS

City of Duarte Ordinance 369 10

City of Santa Ana
Ordinance NS-1287 ..... 11, 46
Ordinance NS-1325 ..... 11, 13

In the
Supreme Court of the United States

October Term, 1982

EDWARD COOPER, CITY ATTORNEY OF SANTA ANA, CALIFORNIA,

Petitioner,

vs.

MITCHELL BROTHERS' SANTA ANA THEATER, located at 1565 West 17th Street, Santa Ana, County of Orange, California; M.B.F.G. THEATER CIRCUIT, INC.; JIM GISH; ALLISON HONER CO., a partnership; UNITED ARTISTS THEATER CIRCUIT, INC.; CONTINENTAL AUXILIARY COMPANY, a California Corporation; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association; JAMES MITCHELL; ARTIE MITCHELL; DEMICH, INC., a California Corporation; MITCHELL BROTHERS FILM GROUP, a General Partnership; CINEMA 7, INC., a California Corporation; Does 1 through 100, inclusive,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the California Court of Appeal, filed on February 18, 1982, following the reversal and remand of its original judgment pursuant to this Court's deci-

sion in Edward Cooper, City Attorney of Santa Ana v. Mitchell Brothers' Santa Ana Theater, ___ U.S. ___, 70 L.Ed.2d 262, 102 S.Ct. ___ (Nov. 30, 1981).

OPINIONS BELOW

The opinion of the Court of Appeal, Fourth Appellate District, Division 2 (following remand from this Court), is reported in 128 Cal.App.3d 937, 180 Cal.Rptr. 728. A copy of the first opinion of the Court of Appeal, filed on Jan. 20, 1981, appears at Appendix A-1 to A-36 to this petition. A copy of the second opinion of the Court of Appeal (following remand), filed on Feb. 18, 1982, appears at Appendix A-37 to A-44 to this petition. A copy of the opinion of the Trial Court, filed June 6, 1978, appears at Appendix B-1 to B-161 to this petition. A copy of the Findings of Fact and Conclusions of law of the trial judge, filed June 6, 1978, appears at Appendix C-1 to C-33. A copy of the "Judgment After Trial By Court",

filed on June 6, 1978, appears at Appendix C-35 to C-45.

JURISDICTION

The opinion of the Court of Appeal (following remand from this Court) was filed on February 18, 1982. A timely petition for hearing in the California Supreme Court was filed on March 29, 1982. The California Supreme Court denied the petition on May 27, 1982. On June 3, 1982, the Court of Appeal filed its remittitur. This petition for certiorari was filed within 90 days from the date the judgment became final. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) and Rules 17(b) and 17(c) of the U.S. Supreme Court.

STATUTORY PROVISIONS INVOLVED

The text of the following statutes and constitutional provisions is set forth at Appendix F-1 to F-21 to this petition: California Civil Code sections 5, 22.5, 3366-3369, 3479-3484, 3490-3495, 3523; California

Government Code sections 38771, 38773 and 38773.5; California Code of Civil Procedure sections 731, 1021 and 1021.5; California Penal Code sections 311, 311.2, 370, 371, 372 and 373a; First, Ninth, Tenth and Fourteenth Amendments to the U.S. Constitution.

STATEMENT OF THE CASE

This case was before this Court during the 1981 October Term in Case No. 81-271 on a Petition for Writ of Certiorari which presented three federal questions. Question 1 presented the federal issue as to whether a court order closing a theater, after trial, for past unlawful conduct was a prior restraint; Question 2, the issue of burden of proof; and Question 3, the issue as to whether, in limiting the public nuisance abatement remedy to a personal injunction against a specific film, the Court of Appeal's Judgment had deprived the City of Santa Ana and its residents of federal rights. In a per curiam opinion in Edward

Cooper, City Attorney of Santa Ana, California v. Mitchell Brothers' Santa Ana Theater, et al., ___ U.S. ___, 70 L.Ed.2d 262, 102 S.Ct. ___ (Nov. 30, 1981), this Court summarily reversed the Court of Appeal's judgment on the "burden of proof" issue, but denied the Petition as to Question 1 and 3. The petition herein presents the same federal questions which were presented in Questions 1 and 3 of the first petition but under different circumstances and in a more refined context, as is explained hereinafter in "Reasons For Granting The Writ", at pages 37-45.

STATEMENT OF FACTS

The following short titles are used hereinafter: "R.T." for Reporter's Transcript; "C.T." for Clerk's Transcript; "C/A.O.B." for Cross-Appellant's Opening Brief in the Court of Appeal.

On June 16, 1975, James Gish, the theater manager of the Mitchell Brothers' Four Star Theater [1] on Wilshire Blvd in Los Angeles, submitted an application to the City of Santa Ana, on behalf of M.B.F.G. Theater Circuit, a division of Cinema 7 Inc., for a business license to operate the Mitchell Brothers' Santa Ana Theater at 1565 West 17th Street, Santa Ana, California (R.T. 987 line 9-988 line 6). On July 14, 1975, United Artist Theater Circuit Inc., executed a 5 year lease of the premises at 1565 West 17th Street to M.B.F.G. Theater Circuit and, by addendum to the lease, dated August 1, 1975, executed by the defendants, James Mitchell and Artie Mitchell, Cinema 7, Inc., became the leasee in place of M.B.F.G. Theater Circuit, (R.T. 1003 line 12-1004 line 11).

1/ The efforts of the City of Los Angeles to halt the operations of the Mitchell Brothers Four Star Theater under the Red Light Abatement Law (Penal Code, sections 11225-11235), for acts committed during 1974, are chronicled in People v. James Mitchell et al., 64 Cal.App.3d 335, 134 Cal.Rptr. 358 (November 30, 1976).

On September 3, 1975, the Mitchell Brothers' Santa Ana Theater commenced its operations under the business license issued by the City and the first program offered a triple feature: "Sodom and Gomorrah", "Behind the Green Door", and "Resurrection of Eve" (R.T. 946 line 9-15; 1049 line 22-1050 line 5), all three of which were produced, directed, and photographed by James Mitchell and Artie Mitchell, and distributed and exhibited by them in their finished form at their own chain of theaters,[2/] acquired by them during the period 1973-1975, and operated as a theater chain under the name, "M.B.F.G. Theater Circuit". (Plaintiff's Exhibit No. 90, R.T. 1045 line 6-11). At the time they commenced their Santa Ana operations, they openly advertised their theaters in Northern California as "Mitchell

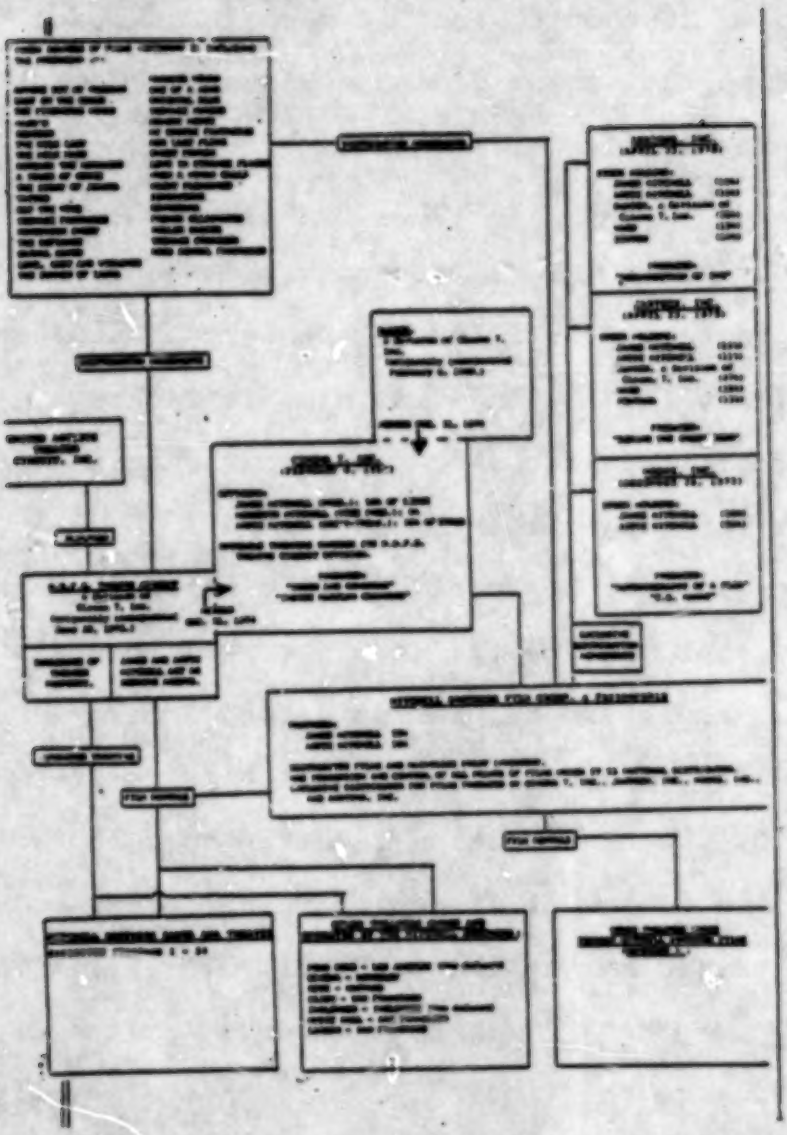
---

2/ Photo-reduced copies of the time and motion studies of the six films produced by the Mitchell Brothers and involved in this and in the three copyright cases Clancy, et al. v. Jartech, Inc., et al., Nos. 81-2094, 81-2095 and 81-2096 appear hereinafter at Appendix D-1 thru D-185.

Brothers Porno Theaters" (R.T. 1051 line 26) and the films which they had produced, directed, and photographed as "hard-core" (R.T. 1055 line 6).

The history of the growth of the operations of James Mitchell and Artie Mitchell, from 1969, as producers and exhibitors of sexually oriented films at their O'Farrell Theater at 895 O'Farrell Street in San Francisco, to their operations in 1975, when they billed themselves as "the Cecil B. DeMille and David O. Selznick of modern porn" (R.T. 1045), is described in the trial testimony of James Mitchell, (C/A.O.B. at A-54 through A-84 and A-116 through A-137). An operational chart of the defendants' "pandering" businesses (Plaintiff's No. 77) appearing on the opposite page, was prepared from the testimony of James Mitchell.

The Mitchell Brothers' Santa Ana Theater was located in the Honer Plaza Shopping area, and adjacent to the First Christian Church, Orange County Social Service Dept.,



Bank of America, Ralphs Market, Sav-On Drug-store, Montgomery Ward, Imperial Bank, and across the street from the Santa Ana Community Junior College (R.T. 711-713). The triple feature ran continuously from 11:00 A.M. TO 11:00 P.M., seven days a week, from September 3, 1975 through January 15, 1976 (R.T. 671). During that time it became a matter of public discussion on the agenda of the City Council (R.T. 1207).

In November of 1975, City Attorney Keith Gow employed special legal counsel to assist him, and a special investigator, Robert McGuire, who paid the admission price of $5.00, began making regular photographic and sound surveillances of the programs being exhibited at the theater (R.T. 370-377). The special counsel was then employed by the City of Duarte in a motion picture theater public nuisance abatement case involving Duarte City Ordinance 369, which was subsequently approved as a procedural ordinance in People ex rel. Camil, City Attorney of Duarte v. Buena

Vista Cinema, 57 Cal.App.3d 497, 503, (1976).

Thereafter, public hearings were held and, on January 19, 1976, the City Council duly enacted Ordinance NS-1287 (R.T. 607 line 21-608 line 12) which was patterned after City of Duarte Ordinance 369, and also approved an "Agreement for Legal Services" for special counsel to assist City Attorney Keith Gow "in connection with litigation to abate conditions within the City, determined by the Council under the provisions of Ordinance No. NS-1287 to be public nuisance." (R.T. 1129). On Jan. 15th, the defendants stopped exhibiting their triple feature (which had run for 4 months) and commenced exhibiting other pornographic films.

On October 4, 1977, a unanimous Santa Ana City Council (R.T. 1212) duly enacted (R.T. 608 line 13-206 line 5) NS 1325 as an emergency ordinance to amend NS-1287 to apply a correction "required by the decision of the Court of Appeal in People ex rel. Camil v. Buena Vista Cinema" (See section

7 at R.T. 1212). Under the amendment, the City Council "upon a specific finding that a public nuisance" existed under the abatement ordinance, was required: "to order the revocation of all licenses and permits which have been issued as a part of the operation of such business, subject to confirmation by the Court in the judicial proceedings required herein. Criminal proceedings for transacting business without a license at such address shall not be filed until the order of license revocation by the City Council has been confirmed by judicial order."

On June 1, 1976, the California Supreme Court rendered its decision in People ex rel. Busch v. Projection Room Theater et al., 17 Cal.3d 42, 130 Cal.Rptr. 328 (June 1, 1976) upholding the application of Civil Code section 3479 and 3480 (the general public nuisance statute) to motion picture theaters engaged in the business of exhibiting obscene films, and on November 1, 1976, this Court denied a petition for a writ of

certiorari in that case, Van de Kamp, as District Attorney v. Projection Room Theater et al., 428 U.S. 922.

Plaintiff's Complaint in Equity for an Injunction and To Abate a Public Nuisance was filed on Nov. 2, 1976, pursuant to Civil Procedure Code Section 731. (C.T. 2) The complaint alleged, in part, that commencing on or about Nov. 28, 1975, and repeatedly and continuously thereafter, up to and including the date of filing of the Complaint, the defendants exhibited at the Mitchell Brothers' Santa Ana Theater, 30 obscene motion picture films in 15 successive programs, identifying the films by name and the dates on or about which they were exhibited; that on Oct. 26, 1976, the City Council had acted by Resolution to revoke the theater's license and to declare the place a public nuisance and in violation of Ordinance NS 1325 and ordered the City Attorney to commence legal proceedings to abate the same by law and to obtain confirmation of the

revocation of license based upon the existence of a public nuisance; that unless restrained, the defendants would continue to show the same and other such obscene films in the future. As a part of the prayer, plaintiff asked for a preliminary and final injunction and asked the Court to fix a time and place for a hearing on a preliminary injunction. (C.T. 2-28.)

At the time of filing, plaintiff noticed a motion for a hearing on a preliminary injunction. On December 1, 1976, plaintiff noticed a motion to advance the hearing on the final injunction and to consolidate the same with the hearing on the application for a preliminary injunction, in anticipation that the defendants would object that plaintiff was not entitled to any relief on a motion for a preliminary injunction. (C.T. 51-52.)

On January 12, 1977, the Court granted plaintiff's motion to consolidate the hear-

ings on the preliminary and final injunction. (C.T. 132.)

On June 6, 1977, the Court granted the plaintiff's motion to file an amended complaint. In its "First Amended And Supplemental Complaint In Equity For An Injunction And To Abate A Public Nuisance", plaintiff identified the names of the films shown from and after the filing of the complaint up to April 1, 1977, the cut-off date previously established by the Court for films which would be included as a part of the subject matter of this action (R.T. for Jan. 28, 1977, at pg. 5, line 6) (C.T. 217-218) and amended the prayer to add the words and phrases "including compensatory damages and punitive damages in an amount to be determined by this Court for the willful, intentional, oppressive and malicious conduct of such defendants" after the words and phrases "and further relief as the Court may deem proper". (C.T. 224.)

The trial began on October 11, 1977, and on October 17, 1977, the trial court determined that the pleadings set up mixed issues of law and equity, and that the case should proceed to a jury trial on the issues of "obscenity", "public nuisance", and "damages", as a matter of right, prior to the trial court's resolution of the equitable issues. (C.T. 328) (C/A.O.B. A-14 thru A-15). On October 25, 1977, the trial judge ordered the jury trial to be <u>further</u> bifurcated, to proceed first on the issue of "obscenity" and "public nuisance", to be followed thereafter on the issue of damages, if necessary to do so. (C.T. 352) (C/A.O.B. A-25).

The "liability" phase of the jury trial began on October 17, 1977, and ended on December 7, 1977. During that period the jury viewed 17 of the 41 feature length films alleged to be obscene (R.T. 727, et. seq.) (C/A.O.B. A-34 thru A-41), and

considered real and testimonial evidence on the scope of the defendants James Mitchell and Artie Mitchell's motion picture operations during the period 1969-1977. (R.T. 843 et seq.). The Court first admitted, (R.T. 604) (C/A.O.B. A-22), then excluded real and testimonial evidence on the remaining 24 films. (C.T. 375-376) (C/A.O.B. A-41). Both James Mitchell and Artie Mitchell were called as witnesses by the plaintiff under C.C.P. section 776 (C/A.O.B. A-54 through A-72; A-77 through A-84; A-117 through A-137; A-142 through A-144) and pursuant to a court order and a subpoena duces tecum. By verdicts rendered on December 6, and 7, 1977, the jury found 11 of the 17 films to be "obscene" under a "beyond a reasonable doubt" burden of proof, and 4 of the 17 films "not obscene" under a "beyond a reasonable doubt" burden of proof, and was unable to reach a verdict on two films. They also returned a public nuisance verdict for the period that the 11 films were shown, under

a "preponderance of the evidence" burden of proof.

The "damages" phase of the trial commenced before the same jury on December 12, 1977 and ended on January 5, 1978. On January 5, 1977, the jury returned its verdicts in the amount of $76,400.00 compensatory damages. No punitive damages were awarded. (R.T. for Jan. 5th at 93). (C/A.O.B. A-289).

On January 5, 1978 the equitable issues stood submitted.

A "Judgment on Verdicts In Open Court" was filed on Jan. 6, 1978 (C.T. 470).

On June 6, 1978, the Court entered its "Findings of Fact and Conclusions of Law", "Judgment After Trial By Court", and "Amended Memorandum of Opinion on the Issues of: (1) Constructive Trust, (2) Revocation of Defendants' Business License, (3) Closure of Defendants' Theatre." (C.T. 1134-1220). In its judgment, the trial court denied the plaintiff's prayer to impose a constructive trust on the defendants' box office receipts,

denied the plaintiff's prayer to approve the action the City Council in Resolution 76-134 which revoked the defendants' licenses and permits, and granted the injunction, permanently enjoining the 11 motion picture films.

The Court, in the exercise of its independent judgment, found the 11 films to be obscene beyond a reasonable doubt and rejected the defendants' proposed counter - findings that four films were not obscene. (R.T. for May 2, 1978 at 5) (C/A.O.B. A-304). The Court also ordered the destruction of the 11 prints that were found obscene. (R.T. for May 2 at 44) (C/A.O.B. A-311). Although the plaintiff's motion to close the theater for one year was denied, on the ground that it was constitutionally impermissible,[3/] the

---

3/ See Conclusion of Law XVI, infra, at pages C-29 and C-30 which reads:

> "Under the facts in this case; namely, that the Defendants are engaged in the commercial exploitation of obscene motion picture films and have for a substantial period of time in the past and as a continuing and regular
> (FOOTNOTE CONTINUED ON NEXT PAGE)

Court ordered the defendants to allow the City's officers "free and total access to all parts of the theater" for a two-year period for monitor purposes and ordered the deposit of a cash bond of $100,000.00 in trust[4/] for

---

course of conduct exhibited sexually explicit films depicting oral copulation, sodomy, masturbation, homosexuality, lesbianism,group sex, portrayed incest, portrayed rape, the licking of sperm from the bodies of the actors and smearing of sperm on the face, and have admitted their intention to continue to show the same similarly sexually explicit films in the future, the abatement remedy of closing the defendants' theater for a period of time would otherwise constitute a proper and suitable equitable remedy except for the law expressed in People ex rel. Busch v. Projection Room Theater (1976), 17 Cal.3d 42, 58 that such closure is prohibited by the Constitution of the United States as a prior restraint."

4/ As to the reasonableness of the amount of the bond, the Court noted (R.T. for May 2, 1978 at 57A) (C/A.O.B. A-313):

THE COURT: All right. That will be noted, but I might say, while not used as supportive of this conclusion, it is a fact, . . . Artie Mitchell in response to this provision says, and I'll show you the newspaper article, . . . "it was no problem", that they "netted . . . close to . . . $400,000.00 during this period of time up at the theater, so that the hundred thousand dollars was no problem"; so that, is simply in response to your claim that you have to have a hundred thousand dollars. But as far as your constitutional argument, I don't see any real

the City of Santa Ana at the United California Bank in Santa Ana as a security deposit against future attorney fees, costs and expenses incurred by the City of Santa Ana in connection with any future public nuisance action filed subsequent to July 1, 1978, and required that said cash bond be maintained for two years.[5/] The Court denied the plaintiff's motion for an award of costs of abatement in the amount of $71,420.22 but allowed the City the recovery of $5869.31 in costs (R.T. for May 2, 1978 at 65 et seq.) (C/A.O.B. A-313).

Both parties appealed to the Court of Appeal, Fourth Appellate District. The defendants appealed and the City both appealed

---

constitutional infringement there because it doesn't create any type of prior restraint whatsoever on you, and certainly there is no proposition of law that there can't be some burdens and some detriment involved in the exercise of First Amendment Rights."

5/ The equitable relief which was granted as an alternative to "closure" was predicated upon the trial judge's interpretation of this Court's previous rulings in obscenity public nuisance abatement litigation. See the opinion of Trial Judge Weeks, infra, at page B-61.

and cross-appealed from the "Judgment on Verdicts in Open Court." The defendants appealed and the City cross-appealed from those portions of the "Judgment After Trial By Court" which were adverse to the respective parties.[6/]

In its opinion filed on Jan. 20, 1981,[7/] the Court of Appeal reversed the "Judgment on Verdicts In Open Court" in its entirety (See opinion at A-35 - A-36) but refused to rule upon any of the errors which Plaintiff

---

6/ In its appeal, the City raised the following federal questions:

> ". . . Whether the burden of proof on the equitable trial (injunction) should have been 'clear and convincing evidence' instead of beyond a reasonable doubt?" (C/A.O.B. 21).
>
> "Whether the trial court erred in its judgment in the third phase of the trial (Re: injunction) which refused to grant the remedy of abatement of the public nuisance by closure, and held that although, under the facts in this case, the abatement remedy of closure of the defendants' theater for a period of time would otherwise constitute a proper and suitable equitable remedy, such was barred by the law expressed in the Busch case that 'closure' is prohibited by the federal constitution as a prior restraint?" (C/A.O.B. 24 lines 9-13).

7/ A copy of the opinion appears herein at Appendix A-1 through A-36.

claimed had occurred during the jury trial phase and addressed itself only to the questions which were raised in relation to the "Equity" phase. The Court stated that injunctive relief against those movies found to be obscene was the only remedy which was permitted under this Court's decision in Vance v. Universal Amusement Co., Inc., 445 U.S. 308.

In its opinion dealing with the "Equity" phase of the trial, the Court affirmed those portions of the "Judgment After Trial By Court" which enjoined the defendants from advertising or exhibiting the eleven (11) films found by the trial court to be obscene beyond a reasonable doubt. The Court also upheld the trial judge's rulings which denied the City's requests for a constructive trust on the defendants' box office receipts, a revocation of the defendants' license, and the closure of defendants' theater for one year, but reversed those parts of the "Judgment After Trial By Court" which ordered access for the City's officers to all parts of

the defendants' theater for two years, the payment by the defendants of $100,000 into a trust fund for the City's future attorney fees, and the destruction of the prints of the eleven (11) films declared obscene, holding that injunctive relief was the only remedy which was permitted under this Court's decision in Vance v. Universal Amusement Co., Inc., 445 U.S. 308. The Court also held that "closure" of the theater "would result in a full and pervasive prior restraint upon the freedom of speech and of the press in violation of the First and Fourteenth Amendments to the United States Constitution" and that under this Court's decision Vance v. Universal Amusement Co., Inc., supra, the burden of proof in a civil public nuisance abatement action against films must be "beyond a reasonable doubt" and not "preponderance of the evidence."

On March 2, 1981 Plaintiff filed a Petition for Hearing in the California Supreme

Court[8/] which was denied on May 13, 1981.

Petitioner filed its first Petition for Writ of Certiorari on August 10, 1981. On November 30, 1981, this Court granted the same in Edward Cooper, City Attorney of Santa Ana v. Mitchell Brothers' Santa Ana Theater, et al., No. 81-271, as to Question 2 (burden of proof), but denied the petition on Questions 1 and 3.

Upon remand to the Court of Appeal, Petitioner argued in its Plaintiff/Appellant's Supplementary Brief, filed on January

---

8/ In its petition the City raised the same two federal questions which were raised in the Court of Appeal, (see pg. 22 at fn. 6) and the following additional federal question regarding the Court of Appeal decision:

> " Whether the decision of the Court of Appeal, by depriving the plaintiff, acting in his representative capacity as the authorized law officer of the City of Santa Ana, of all civil public nuisance abatement and equitable remedies except a personal injunction which can only be obtained: (1) after the exhibition of each obscene film and lengthy litigation; and (2) at great financial risk to the City and its officers and employees; and (3) at great costs of abatement to the City; and (4) without reimbursement from the person maintaining and profiting by such public nuisance, has deprived the plaintiff of a constitutionally adequate judicial remedy?"

4, 1982, that this Court's note of jurisdiction on January 11, 1982 on the closure issue in U.S. Marketing, Inc., et al. v. State of Idaho, No. 81-741 had reestablished "closure" as a litigable issue and that the Court should reexamine the entire appeal, in greater depth, including the "remedy" issues as to closure (Point I); the City Attorney's right to recover monetary damages in a civil action under C.C.P. section 731 (Point IV); the correctness of the trial court's order for the destruction of the 11 films as derivative contraband (Point V); and the right to a reasonable attorney's fee for the abatement of a public nuisance and as the prevailing party on appeal (Point VI). In its opinion (see Appendix A-37, et seq.), the Court of Appeal rejected the Petitioner's argument as to the scope of the appeal and ruled that only the Burden of Proof issue was before the Court, holding that both the First Amendment to the U.S. Consti-

tution and Article 1, section 2 of the California Constitution require that obscenity be proved by "clear and convincing evidence" in a civil public nuisance abatement action. The Court reiterated its earlier opinion on remedies in its entirety and remanded the case to the trial court to allow the City Attorney to seek the one equitable remedy that the Court of Appeal holds is available under the Federal Constitution and its interpretation of this Court's opinion in Vance v. Universal Amusement Co., Inc., supra, namely, an injunction as to the remaining six films.

On March 27, 1982, Petitioner filed a Second Petition for Hearing in the California Supreme Court which was denied on May 27, 1982, with Associate Justice Reynoso dissenting.

SUMMARY OF ARGUMENT

Santa Ana's experience with hard-core pornography at the Mitchell Brothers' Santa Ana Theater for the past 7 years, is a governmental problem which is facing all cities. The problem has escalated. The same pornographic movies are now on TV.

Confusion as to what remedies an Equity Court can apply after trial of a nuisance lawsuit is the result of this Court's not having squarely faced the problem since Huffman v. Pursue, Ltd. (1975) and Art Theater Guild, Inc. v. Ohio ex rel. Ewing.

Vance v. Universal Amusement Co., Inc. was mis-cited . It is inapposite on the issue of what remedies may be applied after a trial on the merits.

The conflict between the California and Idaho Supreme Courts on whether a theater can be closed as a nuisance makes this question ripe for consideration. Rule 17(b).

The question on "closure" is presented

in this petition under different circumstances, and the question of the inadequacy of the state remedy is presented in a narrower context than in the previous petition filed during the 1981 Term.

In considering whether the Petition presents "substantial federal questions", the Court should take judicial notice of other notorious facts relating to the Mitchell Brothers' operations.

I

It is clear that Judge Weeks would have closed the Mitchell Brothers Theater except for the California dictum in Busch that such was not possible under the United States Constitution. The Idaho Supreme Court opinion holding "closure" to be available after trial, as a penalty for a continuous course of past unlawful conduct is correctly reasoned and should be approved.

II

The single remedy allowed - that of a

personal injunction against a specific obscene film - is a worthless remedy. It violates the cardinal rule of law that for every legal wrong there is a legal remedy.

IIA

The reversal of that part of the trial court's order which provided security for future attorney's fees was arbitrary and denied Petitioner of the benefits under California Law which accrue to a prevailing party who acts as a private attorney-general in an "environmental protection" lawsuit.

Under Serrano v. Priest and C.C.P. §1021.5, an attorney's fee, bases upon the private attorney-general concept, is allowed in "environmental protection" cases and can be recovered from a private party defendant. The exclusion as to "public entities" cannot be applied where the City Attorney brings his lawsuit on behalf of the residents in a specific geographical location to protect the moral environment. The City Attorney

and residents are entitled to equal protection of the law and cannot rationally be excluded from the statute's benefits.

IIB

"Damages" are authorized in public nuisance lawsuits. Ruling case law permits the City Attorney to recover "damages" arising out of a "physical" nuisance. There is no distinction between a "physical" and a "moral" nuisance. A private party does not have "standing" to recover "damages" for a moral nuisance. If the City Attorney may not recover "damages", the "damages" will go unrecovered. The result is a taking of property without due process of law.

IIC

Discretion to award an attorney's fee in an "environmental protection" lawsuit is controlled by C.C.P. §1021.5. Petitioner's rights thereto as the prevailing party is not subject to the "public entities" exclusion.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

For 7 years (September, 1975 - August, 1982) the City of Santa Ana has been confronted with a major law enforcement problem in the area of public morals. In September of 1975, a commercial business which produced, distributed and exhibited hard-core pornographic motion picture films on a national scale took over the lease of a neighborhood theater across the street from the Santa Ana Junior College and began showing three hard-core pornographic films which the operators themselves had produced and advertised as "hard-core": "Sodom and Gomorrah", "Resurrection of Eve" and "Behind the Green Door". Since September of 1975, those theater operators have continuously and uninterruptedly, from 11:00 A.M. to 11:00 P.M. and for seven days a week, exhibited nothing but hard-core pornographic films, see Appendix D-1 thru D-185 to this petition.

Remembering the commands of this Court against "prior restraint", expressed in Freedman v. Maryland, 380 U.S. 51, (1965); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, (1975) and a host of other federal decisions, and acting pursuant to the authority of an ancient common law principle which has heretofore been regarded as "sound" in the area of public nuisance law, and recently reaffirmed in People of the State of California ex rel. Busch v. Projection Room Theater, et al., 17 Cal.3d 42, the Santa Ana City Council decided to proceed under the civil law and the basic authorization of the California public nuisance statute and Santa Ana's special public nuisance ordinance.

The Santa Ana experience during the past 7 years is a microcosm of a governmental problem which is perplexing other City Councils and City Attorneys throughout this nation. That problem - the intrusion of

hard-core pornography into the lifestyle of the national community - is not an even which can be brushed under the rug. As noted by Judge Weeks in his opinion (see Appendix at B-45), the defendant James Mitchell testified that he expected to see films like "Behind the Green Door", found by the jury herein to be obscene, to be appearing on television within the near future. That expectation has already borne fruit.

The present uncertainty in public nuisance law, exemplified in the conflict between the rulings of Trial Judge Weeks and the Court of Appeal below, is the result of this Court's not having squarely faced the obscenity nuisance abatement problem since its decisions during the 1974 October Term in Huffman v. Pursue, Ltd., 420 U.S. 592, (1975), and Art Theater Guild, Inc., et al. v. Ewing, 421 U.S. 923, (1975), appeal dismissed for want of a substantial federal question. Unless this Court settles the

substantial federal questions which are raised in the petition herein, such uncertainty will continue, and the City's ability to resolve its public nuisance abatement problem will be seriously impaired.

The Court of Appeal erred when it held Vance v. Universal Amusement Co,, Inc., 455 U.S. 308, (1978) to be apposite and overruled the remedies which had been applied by Trial Judge Weeks after a trial on the merits. The Vance decision decided only the narrow question as to the judicial authority of Texas Courts under the Texas Statutes to grant a preliminary injunction "of indefinite duration on the exhibition of motion pictures prior to a trial on the merits." (Our emphasis.) There was no preliminary injunction issued in the Santa Ana case. At the beginning of the lawsuit, the hearing on the preliminary injunction was consolidated with the hearing on the final injunction (see Statement of Facts, supra, at page 14),

and the trial was thereafter had on the merits. At the conclusion of the trial, plaintiff requested that the premises be closed under the Santa Ana Ordinance (see pp. B-99 thru B-100), based on the notorious nature of the defendants' unlawful past conduct, which had been spread upon the trial record..

Petitioner submits that the recent unanimous decision of the Idaho Supreme Court in Idaho ex rel. Wayne Kidwell v. U.S. Marketing, Inc., ___ Idaho ___, 631 P.2d 622, which holds, contrary to the ruling of Trial Judge Weeks herein and the California Supreme Court in People ex rel. Busch v. Projection Room Theater, et al., 17 Cal.3d 42, that closure of a theater after a trial on the merits "does not by itself constitute an unlawful prior restraint upon the exercise of free speech", makes this a federal question which is ripe for consideration in this petition for certiorari. See Rule

17(b) of the U.S. Supreme Court.

A. The Differing Circumstances In This Second Petition For Writ Of Certiorari Regarding The Federal "Closure" Issue.

The differing circumstances in this second petition are as follows: Six weeks after this Court's decision in the Cooper case, supra, at page 25, the "closure" issue presented in Question 1 was again presented to this Court in a Jurisdictional Statement in an appeal from a decision of the Idaho Supreme Court which rejected the First Amendment claim and upheld the right of a trial court to impose "closure" after a trial on the merits as a penalty for past unlawful conduct, U.S. Marketing, Inc., et al. v. Idaho, et al., ___ Idaho ___, 631 P.2d 622. At that time, this Court noted jurisdiction in U.S. Marketing, Inc., et al. v. Idaho, et al., No. 81-741, ___ U.S. ___, 71 L.Ed.2d 291, ___ S.Ct. ___ (Jan. 11, 1982), but was prevented from deciding the

federal "closure" issue when U.S. Marketing, Inc. dismissed its appeal under Rule 53, subsequent to this Court's note of jurisdiction and before this Court had an opportunity to hear arguments on that issue. See U.S. Marketing, Inc., et al. v. Idaho, et al., No. 81-74[illegible], ___ U.S. ___, 71 L.Ed.2d 878, ___ S.Ct. ___ (Mar. 10, 1982).

While the procedural aspect in which the "closure" issue is being presented in this case differs, in that such is being raised by the City Attorney on behalf of the residents of Santa Ana in a Petition for Writ of Certiorari, whereas in the U.S. Marketing, Inc., case, supra, that issue was raised by the distributors of obscene matter in a jurisdictional statement pursuant to an appeal, the substantial nature of the federal question is not diminished. Petitioner submits that, in as much as the trial facts and the "closure" issue presented a "substantial federal question" under this

Court's note of jurisdiction in the Idaho case on January 11, 1982 (see Supreme Court Rules 15.1(h) and 16.1(c)), then, a fortiori, a substantial federal question has been raised by the Statement of Facts herein, which show: [9/] (1) that the residents of the City of Santa Ana, California are attempting to preserve the moral environment of that City by ousting the Mitchell Brothers' Santa Ana Theater which, except for a three month period from January to March, 1979, has shown nothing but hard-core pornography for the past seven years (Sept. 1975 thru August 1982); and (2) the trial judge has ruled that, under the trial facts, he would exer-

---

9/ The City of Santa Ana and the Mitchell Brothers are also before this Court in three Petitions for Writs of Certiorari in Clancy, et al. v. Jartech, Inc., et al., Case Nos. 81-2094, 81-2095 and 81-2096, involving a federal copyright infringement trial brought by the Mitchell Brothers and federal questions as to whether obscene matter can be issued a copyright under federal law and whether the copying by the City was "fair use" as a matter of law. Petitioner requests this Court to take judicial notice of the subject matter in those Petitions, in determining whether the "Questions Presented" in the Petition for Writ of Certiorari herein are worthy of plenary review.

cise his Equity Powers and close the theater if such were permissible under the federal constitution (see Conclusion of Law XVI at pages C-29 and C-30).

On the issue as to whether this Petition presents a "substantial federal question", Petitioner requests this Court to take judicial notice of two newspaper items which appeared in the New York Times on July 1, 1973 and in the San Francisco Chronicle on July 16, 1973, copies of which appear herein at Appendix G-1 thru G-4. Those articles reported on the comments of James and Artie Mitchell following this Court's decision in Miller v. California, 413 U.S. 15 and its companion cases, as follows:

NEW YORK TIMES, July 1, 1973:

" SAN FRANCISCO, June 30-- In the major pornography producing centers of Los Angeles and San Francisco, the Supreme Court's latest ruling on obscenity was met this week with concern and anger but also with the promise that the business was not dead.

In San Francisco, James Mitchell, who along with his brother Artie has emerged as one of the most successful

pornographic-film makers in the nation, called the Court's ruling on June 21 'totally insane.'

But while he was critical of the decision, he said that he would not be forced out of business. 'They'll have to put us in jail,' he said. 'We're prepared to go down fighting.'

. . . . .

In Los Angeles, another film maker, Russ Meyer, said that he believed the effect of the ruling would be devastating. 'You can't jeopardize investors' money,' he said, explaining that it was not now known when a film was made where it could be shown.

But James Mitchell, who is 29 years old, took another view. 'The young Turks don't give a damn,' he said. 'They'll keep on making movies. They don't know any better. After all, we're only in it to have a good time and make money.'"

SAN FRANCISCO CHRONICLE, July 16, 1973:

" Artie Mitchell and his brother Jim, both in their 20's, head the Mitchell Brothers Film group, a five-year-old concern that began with 15-minute films of nude, gyrating women and is now enjoying the profits of 'Behind the Green Door' starring Marilyn Chambers, the noted former Ivory Snow model.

'We are not going to change anything, not one whit, unless someone comes in here and actually drags us off to jail,' he says.

He said he plans to go ahead with distribution of another film starring Miss Chambers, 'The Resurrection of Eve,' and will begin work soon on 'our first hardcore political satire.'

ELSEWHERE

He wouldn't give many details, but he said the next venture will involve 'characterizations' of President Nixon and Supreme Court Chief Justice Warren Burger."

Petitioner also requests this Court to take Judicial Notice of the transcript of the testimony of the City's surveillance operator in the second and third Santa Ana public nuisance abatement lawsuits, a copy of which appears at Appendix M-1 thru M-17 in the Petition for Writ of Certiorari in No. 81-271, and the testimony of the surveillance operator re the "sameness" in the nature of the films shown during the seven year period (at Appendix M-5). See, also, Appendix "G" to Application A-1071, filed with this Court during the 1981 October Term, being pages 45-52 of the deposition of James Mitchell which was stipulated into evidence as Exhibit 3 in the pending trial of the second and third public nuisance abatement lawsuits. In his deposition,

James Mitchell admitted that the defendants specialize in hardcore films and, except for a three month period when they showed only "soft core" pornography, have show nothing but hard-core pornography at the Santa Ana Theater for the entire period of 1975-1981 (5 years). The surveillances undertaken by the City of Santa Ana during that seven year period have involved approximately 364 programs (52 weeks for 7 years) and 500 films (2 films per program). A list of the hard-core pornographic films which have been produced and surveilled during that period appears herein at Appendix H-1 thru H-27. As a result of this Court's inaction, those films are now appearing on T.V.

B. <u>The Refinement In This Second Petition For Writ Of Certiorari Presented By Subsidiary Questions 2A, 2B and 2C On The Broad Question As To Whether By Limiting Santa Ana's Remedy To A Personal Injunction Against A Specific Film, The Court Of Appeal's Judgment Has Deprived The Petitioner Of Federal Rights</u>.

The broad general question which was

posed in Question 3 of the first petition appears as Question 2 in this second petition for writ of certiorari and has been refined by framing additional subsidiary questions 2A, 2B and 2C as questions which are fairly included within the principle question.

The trial court's judgment, dated June 6, 1978 (see Appendix C-41, et seq.), continued the trial court's jurisdiction over the theater for two years, and awarded the Petitioners the right to attorney's fees, costs and expenses incurred by the City in the future, where it was the prevailing party in public nuisance abatement lawsuits against the Mitchell Brothers' Santa Ana Theater filed subsequent to July 1, 1978. The Court of Appeal's decision reversed the trial court's award of attorney's fees in future cases, and deprived Petitioner of that attorney's fee remedy under its interpretation of this Court's decision in Vance

v. Universal Amusement Co, Inc., 455 U.S. 308. The California Court's refusal to recognize Santa Ana's right to an attorney's fee under the trial court's exercise of its Equity Powers presents an "equal protection" conflict with the California Supreme Court's decision in Serrano v. Priest, 20 Cal.3d 25 at 46, and the California Legislature's enactment in Code of Civil Procedure section 1021.5 which enlarged upon the Serrano ruling. Zobel v. Williams, ___U.S.___72 L.Ed. 2d 672 at 677, 678 (June 14, 1982).

I

TRIAL JUDGE WEEK'S CONCLUSION OF LAW XVI THAT, AS AN EQUITY JUDGE HE WOULD HAVE CLOSED THE MITCHELL BROTHERS' SANTA ANA THEATER AS A PUBLIC NUISANCE EXCEPT FOR THE FACT THAT THE FEDERAL CONSTITUTION PREVENTED "CLOSURE", WAS BASED UPON AN ERRONEOUS PREMISE. A TRIAL COURT HAS THE EQUITABLE POWER, AFTER A TRIAL ON THE MERITS, TO CLOSE A THEATER WHICH PRESENTLY CONSTITUTES A PUBLIC NUISANCE, AS A PENALTY FOR A PAST CONTINUOUS COURSE OF UNLAWFUL CONDUCT. SUCH AN ORDER DOES NOT CONSTITUTE AN UNLAWFUL PRIOR RESTRAINT UNDER THE FEDERAL CONSTITUTION.

Trial Judge Marvin Weeks' ruling on closure in Conclusion of Law XVI (see foot-

note 3 on page 19, supra) was drawn from a background of sordid facts (See Findings of Fact XVI, XVII, XVIII and XIX at Appendix C-16 thru C-19 herein). It is clear from Judge Weeks' opinion that he would have closed the theater as a public nuisance under Santa Ana Ordinance N.S. 1287, section 12-102 (see Appendix B-99 thru B-100) and People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 42, upon the conclusion of the trial on the merits except for the fact he believed that, under the federal constitution, he had no power to do so under any set of circumstances. See Judge Weeks' opinion, filed June 6, 1978, at Appendix B-61 herein:

> "Basing its decision then on the Busch case, supra, and the host of authorities cited therein, this Court must reluctantly deny plaintiffs the ultimate relief sought; to-wit: Closure of defendants' theatre for one year, and turn to some other means of giving full recognition to the jury's determinations which this Court considers as the voice of the majority of the moral and decent citizens in the County of Orange, in addition to this Court's

> independent determinations based on the totality of all the evidence and circumstances herein."

See, also, the reporter's transcript for May 2, 1978, where Judge Weeks noted that his Conclusion of Law was intended as a statement of the law, not a criticism of the law, at page 54. line 5 through page 57, line 17, and in particular, page 56, line 25 through page 57. line 17, reading:

> "THE COURT: . . . As I see it, that if the Appellate Court disagrees with my Conclusion of Law as stated in Busch and the Constitution, then they may see fit to reverse my decision, you see, based on this enumerated set of circumstances, and that is the way I see it, and I think that the atmosphere of the community and the cases are such that the Court, whichever one it is, here or in San Francisco or in Washington D.C. should have the opportunity to know that this little guy, that is sitting down here by assignment from the Municipal Court recognized that he would have closed this theater, based on the law, if it were not for the Busch case and the Constitution and that's all that I wish to portray in this Conclusion. And so, while I accept your position that, because it is stated that way, that it is critical of the law, it is not intended to be. It is simply intended to be my opinion of a correct status of what the law is, and what the facts were in this partic-

ular case."

Actual harm to Plaintiff from the asserted constitutional error is clear (see Finding of Fact No. XIX at Appendix C-18). Had the theater been closed, the City of Santa Ana would not now be presented with the problem it still confronts, four years after the final judgment was entered in the lawsuit.

The roadblock which Trial Judge Weeks faced was the dictum in People ex rel Busch, et al. v. Projection Room Theater, et al., 17 Cal.3d 42, 58, 130 Cal.Rptr. 328, 337 that "to grant the relief sought by plaintiffs (i.e., closing down the premises in question) would result in a full and pervasive prior restraint upon the freedom of speech and of the press in violation of the First and Fourteenth Amendments to the United States Constitution." That this language of the majority opinion in Busch was merely dictum, is established from an examination

of the concurring and dissenting opinion of Associate Justice Clark at page 62 reading:

> "I concur in the judgment and the opinion of the court except insofar as the new opinion differs from the vacated opinion by substitution of the material at page 337 to page 338 of 130 Cal.Rptr., at page 600 to page 610 of 550 P.2d in place of the following paragraph: 'We express no opinion upon the further question whether the court may, in addition, either close the premises entirely or enjoin further "obscene" exhibitions regarding materials not yet adjudged obscene. Several cases suggest that such further forms of relief would be appropriate and constitutionally permissible. (Citation of cases.) Since the United States Supreme Court has not yet spoken on this difficult question, and since in this posture of the case the issue is not before us, we leave the question open for further consideration." (Our emphasis.)

The issue presented herein has not previously been before this Court. The question of closure was presented to the trial judge after a trial on the merits, in which the proof conclusively shows that obscene motion picture films were shown continuously and as a regular course of business, at which time the trial judge ruled that, were

he permitted to close the theater under the federal constitution, he would have done so. Petitioner submits that, on these facts, the law is as was stated by the Idaho Supreme Court in Idaho ex rel. Kidwell, supra, and for the reasons therein given:

> "We therefore conclude that, under the circumstances of this case, a one-year closure of forfeiture order does not by itself constitute an unlawful prior restraint upon the exercise of free speech. Our conclusion is based on the following: the extensive power of the state to impose a forfeiture on neutral and innocent property used in the commission of forbidden acts; the power of the state to impose sanctions of its choice upon those who disseminate unprotected obscenity; the fact that the forfeiture or closure order is not directed at any speech or publication, but is instead aimed at the real property apart from the content of expression contained therein; and the fact that the defendants remain free to disseminate any materials, except those already determined to be obscene, at any other location, subject of course to further penal actions by the state should the defendants again violate laws regulating obscenity. Again, our conclusion is premised on the fact that, as shown by the record below, the one-year closure would be imposed only after a judicial determination of obscenity made pursuant to constitutionally acceptable procedures."

II

THE COURT OF APPEAL'S JUDGMENT WHICH PRECLUDES ALL CIVIL PUBLIC NUISANCE ABATEMENT AND EQUITABLE SANCTIONS EXCEPT A PERSONAL INJUNCTION AGAINST A SPECIFIC FILM HAS DEPRIVED THE PLAINTIFF OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW AND A CONSTITUTIONALLY ADEQUATE JUDICIAL REMEDY. THE REMEDY IS INADEQUATE AND A DENIAL OF DUE PROCESS OF LAW BECAUSE A PERSONAL INJUNCTION AGAINST EACH FILM CAN ONLY BE OBTAINED AFTER THE EXHIBITION OF EACH OBSCENE FILM AND LENGTHY LITIGATION; AND AT GREAT COSTS OF ABATEMENT TO THE CITY; AND AT GREAT FINANCIAL RISK TO THE CITY AND ITS OFFICERS AND EMPLOYEES; AND WITHOUT REIMBURSEMENT OF ABATEMENT COSTS FROM THE PERSON MAINTAINING AND PROFITTING FROM SAID PUBLIC NUISANCE; AND WITHOUT THE REMEDY OF AN ATTORNEYS' FEE WHICH REGULARLY IS AWARDED TO OTHER PARTIES IN SUCH ENVIRONMENTAL PROTECTION CASES; AND RESULTS IN A TAKING OF PROPERTY WITHOUT JUST COMPENSATION.

The record herein clearly establishes a moral public nuisance and a "serious wrong (harm)" [10/] for which the law must

---

[10/] See Findings of Fact XVII, XVIII, and XIX, at Appendix C-17 and C-18; Conclusion of Law IV at Appendix C-23, Conclusion of Law XVI at Appendix C-29, and Judge Week's opinion at Appendix B-48 through B-54.

provide an adequate remedy.[11/]

It should be noted that, in an obverse situation, where the California State legislature refused to provide funds to satisfy a judgment of the California Supreme Court awarding an attorney's fees "under the substantial" benefit theory in Mandel v. Myers, 29 Cal.3d 531, 174 Cal.Rptr. 841 (June 18,

---

11/ California Civil Code Section 3523 provides: "For every wrong there is a remedy." See, also, James Phalen v. Commonwealth of Virginia, 12 L.Ed. 1030, 1033 (1850):

> "The suppression of nuisances injurious to public health or morality is among the most important duties of government. . . . It is a principle of the common law, that the king cannot sanction a nuisance."

It is a fundamental rule of the common law that "the Courts are the guardians of the public morals," Sir Charles Sedley's Case, 1 STD 168; Rex v. Curl, 2 Strange 789 (1727). The power of Courts of Equity, in regard to public nuisances, transcends that of Courts of Law and "is a salutary jurisdiction, expecially where a nuisance affects the health, morals, or safety of the community." Mugler v. Kansas, 123 U.S. 205 at 214 (Dec. 5, 1887).

1981) Chief Justice Bird viewed such denial of a "proper redress" as indicative of government "of men" and not "of law" (dissent, at 564):

> "The real problem here involves the proper remedy for the holders of this valid legal judgment for attorney fees. The dissent is wrong when it concludes that there is no remedy available to these judgment creditors. Chief Justice John Marshall set down the rule of law in 1803 in Marbury v. Madison. 'In the 3d vol. of his Commentaries (p. 23). Blackstone states . . . "In all other cases, . . . it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded." And afterwards (p. 109, of the same vol.), he says, ". . . for it is a settled and invariable principle . . . that every right, when withheld, must have a remedy, and every injury its proper redress." [P] The government of the United States has been emphatically termed a government of laws, and not of men [or women]. It will certainly cease to deserve this high appellation. if the laws furnish no remedy for the violation of a vested legal right.' (Marbury v. Madison (1803) 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60).
>
> In the face of the Legislature's unjustified refusal to pay this valid judgment, the state should be treated like any other intransigent civil litigant."

As applied to the trial facts herein, the single right to a personal injunction against a specific obscene film which the Court of Appeal authorizes, is an illusion and fails to provide an adequate remedy. See footnote 12 infra at p. 55. The Mitchell Brothers business practice is to show 2 pornographic films on a program and change the program each week. In 7 years, the theater has exhibited approximately 500 different pornographic titles. The short run of each film and the theater's ability to shorten that run even further, coupled with the practical problem of Plaintiff's not being able to force the defendants to an early trial on the merits in such cases, makes the personal injunction against a specific film worthless, especially where the film itself must be given back at the conclusion of the lawsuit, and it can be expected that each of

such lawsuits will be tenaciously resisted, that the City's costs of abatement will be substantial, and that the costs may not be recovered by the Plaintiff in such lawsuit either as costs of abatement or damages or attorney's fees. On the other hand, the defendants benefit from such prolonged and unproductive litigation, in that the substantial profits being derived from the box office of the moral public nuisance, ($1200.00 per day, see Statement of Facts at page 20, fn. 4; Appendix C-18) provide the defendants with a slush fund which more than underwrites their costs of litigation and allows a substantial profit, whereas the budgetary problems of Cities today make such prolonged and unproductive litigation unattractive.[12/]

[12/] The cost to the City of Santa Ana for the first public nuisance abatement lawsuit was $71,420.20.

II

A. The Court Of Appeal's Reversal Of That Part Of The Trial Court's Judgment Which Ordered "The Payment By The Defendants Of $100,000 Into A Trust Fund For The City's Future Attorney's Fees" Was Arbitrary And Denied The City Attorney, Acting For And On Behalf Of The Residents Of Santa Ana, Equal Protection Of The Law By Denying The Benefits Under California Law Which Accrue To A Prevailing Party Who Acts As A Private Attorney-General In An "Environmental Protection" Lawsuit.

In Serrano v. Priest, 20 Cal.3d 25 at 47, the California Supreme Court exercised its Equity Powers and authorized the payment of attorney's fees in other similar cases where "rights created or protected by the State Constitution are protected to the benefit of a large number of people" and where the "nature of the litigation was such that subsidization of the plaintiff is justified in the event of their victory under the private attorney-general principle". The Serrano rationale is based upon the "private attorney-general concept".

In Code of Civil Procedure section 1021.5 (see Appendix F-11) the State Legislature codified and enlarged upon the Serrano ruling to include cases beyond those vindicating constitutionally based rights, Woodland Hills Residents Assn., Inc. v. City Council of Los Angeles, 23 Cal.3d 917 at 925, and authorized the payment of attorney's fees to others, but included a provision which excluded such payments to "public entities". The statute, which was effective on January 1, 1978, applies to all cases which are on appeal at the time of the enactment, Woodland Hills Residents Assn., Inc. v. City Council of Los Angeles, 23 Cal.3d 917 at 925. A motion for attorney's fees under C.C.P. section 1021.5 need not be made until after the judgment is final, Marini v. Municipal Court for Santa Cruz, etc., 99 Cal.App.3d 829 at 835, 160 Cal. Rptr. 465 at 469. Further, the private attorney-general attorney's fee under C.C.P.

§ 1021.5 can be recovered in a case such as this, where the defendant is a private party, Franzblau v. Monardo, 108 Cal.App.3d 522, 529, 166 Cal.Rptr. 610, 614 (July 24, 1980, hearing denied Sept. 17, 1980).

In Woodland Hills Assn., Inc. v. City Council of Los Angeles, 23 Cal.3d 917 at 936, fn. 11, the California Supreme Court held that an "environmental protection" lawsuit is included with the ambit of C.C.P. §1021.5. Because there is no difference between a "physical" public nuisance and a "moral" public nuisance, see People ex rel. Busch, et al. v. Projection Room Theater, et al., 17 Cal.3d 42, it must follow that an obscenity public nuisance abatement lawsuit to protect the moral environment would also be within the ambit of the statute and, the City Attorney having prevailed and having satisfied the requirements of C.C.P. §1021.5, should be entitled to a private attorney-general attorney's fees, both under

Serrano and C.C.P. §1021.5.

Although C.C.P. §1021.5 contains an exclusion as to "public entities", that section may not logically be interpreted to apply in a situation where the City Attorney is the plaintiff rather than a defendant and the City Attorney is bringing his lawsuit on behalf of the residents in a specific geographical location as an "environmental protection" lawsuit.

Under Owen v. City of Independence, Mo., 445 U.S. 622, which withdrew governmental immunity and made a city (and its residents as taxpayers) absolutely liable for damages and attorney's fees for Civil Rights violations under 42 U.S.C. sections 1983 and 1988; and under Serrano, supra, and C.C.P. section 1021.5, which made such city (and its taxpayers) liable for attorney's fees in environmental protection cases where they, as defendants, are not the prevailing party, it no longer can be reasoned that such "pub-

lic entity" group can be excluded under a "rational" equal protection classification when it as plaintiff prevails in environmental protection (public nuisance abatement) cases. See Builder's Supply Depot v. O'Connor, (1907) 150 Cal. 265, 88 P. 982; Gulf C. and S.F.R. Co. v. Ellis, (1897) 165 U.S. 150; see also, 73 A.L.R.3d 515.

II

B. The Refusal To Permit The City Attorney, Acting For And On Behalf Of The Residents Of Santa Ana, The Right To Recover Damages Resulting From The Public Nuisance Constitutes A Taking Of Property Without Due Process Of Law.

"Damages" resulting from a public nuisance may be recovered in a civil lawsuit. C.C. §3484 (Appendix F-5); C.C.P. §731 (Appendix F-9). Further, a private party may maintain an action for a public nuisance, when it is specially injurious to him, C.C. §3493 (Appendix F-6).

The legislative history and ruling case law clearly establishes that a City Attorney may recover "damages" resulting from a "phy-

sical" public nuisance. For the law prior to 1905, see San Francisco v. Buckman, (1896) 111 C. 25, 43 P. 396. See, also, Johnson v. V.D. Reduction Co., 175 Cal. 63 (1917), which held that the 1905 amendment was not intended to change existing rights. See, also, People, et al. v. City of Los Angeles, 160 C.A.2d 494, 508 (1958), petition for hearing denied on July 11, 1958, holding that a City Attorney could recover "damages" under Code of Civil Procedure section 731 for a "physical" public nuisance (discharge of sewage).

California law makes no distinction between a "physical" public nuisance and a "moral" public nuisance. People ex rel. Busch, et al. v. Projection Room Theater, 17 Cal.3d 42 (1976). Therefore, the right of the City Attorney to recover "damages" clearly exists under C.C.P. section 731.

Under the Court of Appeal's judgment, an obvious injustice results. The residents

of Santa Ana have a fundamental common law right to abate a public nuisance (which is also a private nuisance to them), and to recover damages for the harm occasioned by its proximity to their real estate. Under California case law, that may only be accomplished if the City Attorney brings that action, in that a resident does not have "standing" to abate a moral public nuisance which is a private nuisance to the resident. See Harmer, et al. v. Deep Throat, No. 76-1522, 432 U.S. 907 (June 20, 1977); Harmer, et al. v. Devil in Miss Jones, No. 76-1110, 430 U.S. 967 (Apr. 18, 1977). If the residents do not have "standing" and the City Attorney may not recover "damages" on their behalf, the result is a taking of property without due process of law.

This Court has made the City (and its taxpayers) absolutely liable for damages, for civil rights violations, Owen v. City of Independence, Mo., supra. Had the City

failed to prevail on the "Burden of Proof" issue and on the merits, the Mitchell Brothers would have had recourse for damages and attorney's fees under 42 U.S.C. sections 1983 and 1988. Where the City Attorney, as plaintiff, prevails on the merits, substantive due process and equal protection of the laws require that he be allowed to recover "damages" on behalf of the residents whose property has been injured by the "per se" public nuisance. Nebbia v. New York, 291 U.S. 502 (1934); Skinner v. Oklahoma, 316 U.S. 535 (1942).

II

C. The Trial Court's Discretion To Award An Attorney's Fee In An "Environmental Protection" Lawsuit Brought By The City Attorney On Behalf Of The Residents Of Santa Ana, Is Controlled By C.C.P. §1021.5. Upon Remand Petitioner Is Entitled To The Allowance Of An Attorney's Fee Which Is Not Subject To The "Public Entities" Exclusion Of C.C.P. Section 1021.5.

Pursuant to the above rationale, the trial court's discretion to award an attorney's fee in an "environmental protection"

lawsuit brought by the City Attorney on behalf of the residents of Santa Ana, is controlled By the public policy expressed in Serrano, supra, and C.C.P. §1021.5. Upon remand, an attorney's fees should be awarded to Petitioner, both at the trial level and upon appeal. See Woodland Hills Assn., Inc. v. City Council of Los Angeles, 23 Cal.3d 917 at 948, fn. 15; Serrano v. Priest, 20 Cal.3d 25, 50 (Nov. 17, 1977).

Petitioner requests this Court to grant its writ of certiorari on the "due process" and "equal protection of the law" issues, which confront the "public entities" exclusion of C.C.P. §1021.5, so that a definitive ruling on those issues may also be had.

CONCLUSION

The trial judge ruled that, upon the trial record before him, he would have closed the theater if he could, but that he was prevented from doing so by the California Supreme Court's interpretation that the

same was an unlawful prior restraint under the U.S. Constitution. The Idaho Supreme Court has held, to the contrary, that an Equity Court can close a premises which presently constitutes a public nuisance (Obscenity) as a penalty for past unlawful conduct. The question of "closure" is ripe for review under Rule 17(b).

This Court should also grant this petition and decide whether the Court of Appeal's judgment, denying all public nuisance abatement remedies except a personal injunction against a specific obscene film, has deprived the Petitioner of a constitutionally adequate remedy, and whether the "public entities" exclusion of C.C.P. §1021.5 bars Petitioner's recovery of attorney's fees under the private attorney-general concept.

DATED: August 24, 1982

Respectfully submitted,

_____

James J. Clancy
Attorney for Petitioner.

CERTIFICATE OF SERVICE

I, hereby certify that on this 25th day of August, 1982, the original and 40 copies of the within Petition for Writ of Certiorari were deposited in the United States Post Office in Phoenix, Arizona, with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

LAW OFFICE OF ROBERT L. THORP, JR.
1524 California Street
San Francisco, California 94109

James J. Clancy
9055 La Tuna Cyn. Rd.
Sun Valley, CA 91352

Attorney for Petitioner.